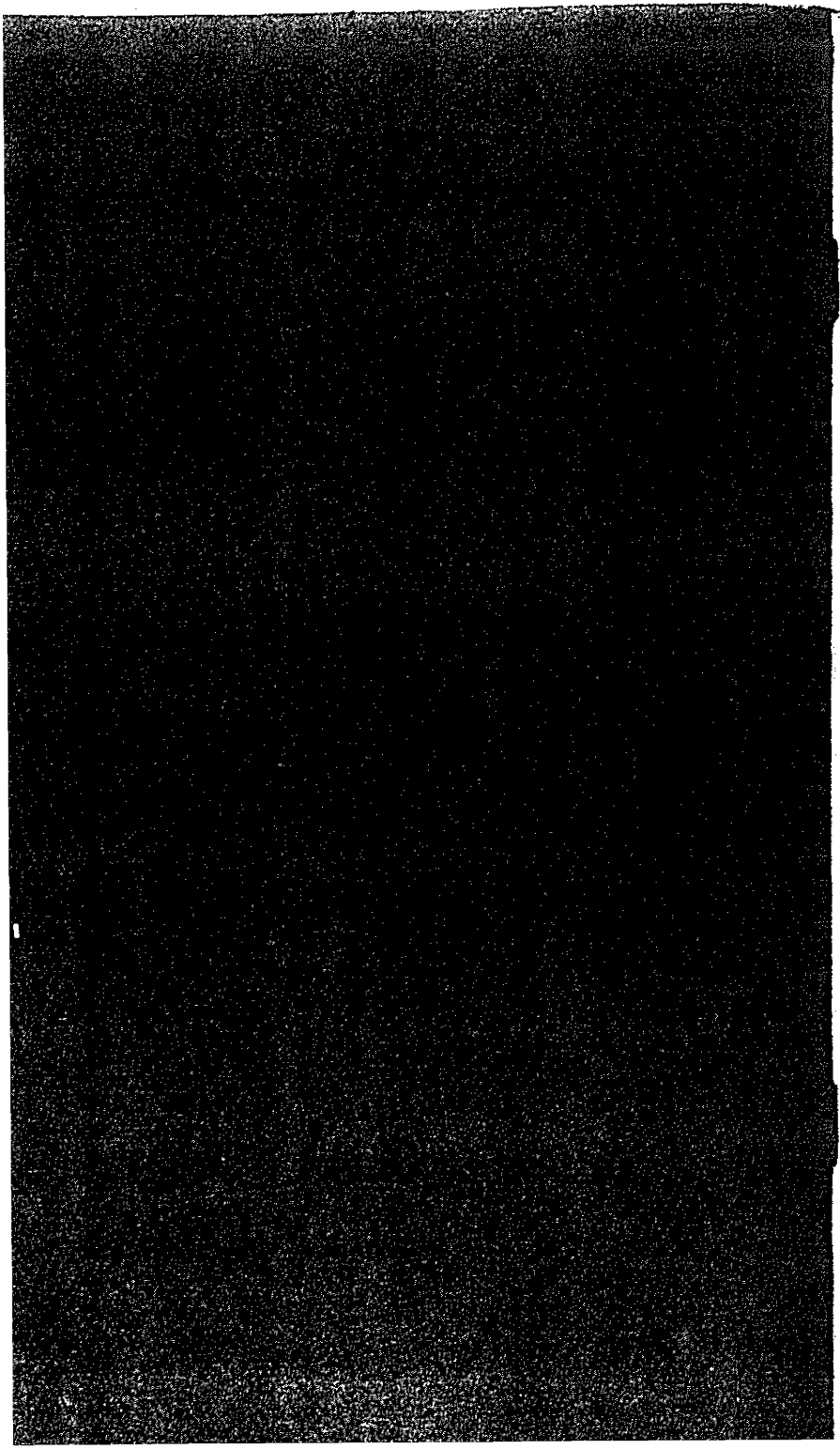
CANADA'S NEED

FOR A WRITTEN

BILL OF RIGHTS

WATCH TOWER BIBLE AND TRACT SOCIETY



BILL OF RIGHTS

Recent events in this Dominion have caused many thinking persons to realize that civil liberties are not as secure as was previously believed. Canadians fear the rise of totalitarian intolerance, abandonment of rule of law, and the curtailing of vital civil liberties. Doubtless this concern has aroused the current agitation for a written Bill of Rights to protect freedom of speech, press and worship against invasion.

By way of illustration some of the outstanding instances of denial of civil rights are mentioned: Over one hundred Bibles have been seized and held by the police as evidence on a sedition charge; respectable men and women have been arrested while merely walking on the street, and thrown into prison on trumped-up charges; peaceable Christian assemblies of minority groups have been invaded by police and lawless mobs, without any official action being taken; citizens have been arrested and prosecuted simply for exercising the ancient British right of petitioning Parliament; night raids by police and seizure of personal property; the despicable action of a Provincial Attorney-General who ruined the business of a respectable citizen for the offence of lawfully assisting persons whose religion was not approved.

Events such as these have shocked all freedom-loving Canadian citizens and caused them to stop and think! "Is there no legal protection against such outrages? Can my business be ruined too, if someone does not approve of my religion? Can I, too, be thrown in jail on some flimsy pretext without legal recourse? Why do we not have a written guarantee of our liberties? After all our rights are no safer than those of every minority!"

The feeling of many was voiced by Mr. David Croll, M.P. who said:

> I am perturbed about the rights of minorities. Now we are masters of our own destiny it is more vital than ever that our civil liberties be adequately safeguarded. A bill of rights to this effect must, and should be, passed at the next session. We have conferred on the Supreme Court of Canada the final disposition of Canadian

rights. We must also give them a clear statement of what those rights are.*

This statement expresses the view of so many Canadian people that within the short space of four weeks, more than five hundred thousand persons signed a petition demanding the enactment of a written Bill of Rights.

II

Value of a Bill of Rights

To see how a Bill of Rights can act as a bulwark in the protection of civil liberty, regard the wonderful part it has played in the United States. There the Constitution provides:

> I. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;
>
> XIV. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

These provisions have been the subject of much litigation and an analysis of the part they have played in protecting free speech and freedom of worship in the United States of America will afford forceful illustration of how a Bill of Rights would secure civil liberties in Canada. The court records of the United States show that legal guarantees of free speech and freedom of worship are much stronger there than in Canada. While considering records of prosecution for expression of opinion, let us remember that it is not only the person prosecuted whose views are suppressed. As a very learned commentator on civil liberties has said:

> . . . it seems to me unsound to regard the persons who are actually suppressed as the sole victims of suppression . . . Imprisonment of 'half-baked' agitators for foolish talk may often discourage wise men from publishing valuable criticism of governmental policies. . . . Thus unremitting regard for the First Amendment benefits the

* *Toronto Daily Star* - January 13th, 1947.

nation even more than it protects the individuals who are prosecuted.*

In the same vein are the statements of Thomas Jefferson in the preamble to the Virginia Statute of Religious Liberty:

> . . . that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he, being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square or differ from his own; that it is time enough for the rightful purposes of civil government, for its officers to interfere, when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail, if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.
>
> Be it enacted . . . that all men shall be free to profess, and by argument to maintain their opinions in matters of religion, . . .

Nothing is perfect or incapable of improvement. It is only by criticism, the weighing pro and con of conflicting views, that the logic of the most advantageous course can be presented. On occasion there will be abuses and overstatements on one side or the other; but the freedom of each to present its contention enables the public mind to strike a balance. When this is denied, the controlling authority is able to give a biased view of the situation. Basically free speech and press involve the right to try men, theories and proposals at the bar of public opinion. The value of the information lies in reaching the public. To accomplish this, the door of communication must remain open.

Many and varied are the methods that have been employed by persons who have sought to prevent free communication of opinion and incidentally stifle criticism of treasured persons or causes. The battle against these reactionary developments has caused in the United States a tremendous struggle to maintain these vital freedoms. Since 1920 over four thousand cases on this subject have been fought, the majority by Jehovah's witnesses.

* Zechariah Chafee, Jr. *"Free Speech in the United States"* 1941 Harvard University Press, Cambridge.

During the course of these proceedings the hysteria of persecution reached at times a frenzy bordering on insanity. Thousands of men, women, and children were arrested and imprisoned on false charges ranging from peddling and obstructing traffic to sedition and conspiracy to overthrow the government. Every one of these charges was ultimately disproved. Mob violence, beatings, burning of meeting halls, and even murder were the ghastly results of the campaign of religious persecution that waged for some years in the United States. In most cases no action whatever was taken against the perpetrators of these offences. In one case, however, a chief of police and deputy sheriff had forced a group of Jehovah's witnesses to drink large doses of castor oil and had paraded the victims through the streets of Richwood, West Virginia, tied together with police department rope. The trial of this outrage resulted in a two year term for the deputy sheriff.*

The following excerpt from an authoritative statement filed before the Supreme Court of United States is a graphic illustration of the wild forces released by judicial approval of intolerance:

> In September 1942, Jehovah's witnesses assembled in 52 cities in the United States, with Cleveland, Ohio, as the key assembly point and the other cities linked by telephone lines. In three of the cities *mobocracy* 'took over' and the 'four freedoms' were *blitzkreiged*. At Little Rock, Arkansas; Springfield, Illinois, and Klamath Falls, Oregon, demonized mobs overran these three cities unhindered by the duly elected officers of the municipalities; property was destroyed, cars and trucks overturned, telephone lines cut, assembly halls damaged, bonfires of Bible literature crackled and blazed in the streets; crowds of men, women and children assailed; children stoned, teeth knocked out, noses broken; Christian women foully cursed, brutally beaten and then robbed; Christian men feloniously assaulted, clubbed, slugged with blackjacks, knifed and shot; victims left bleeding, clothing of some completely torn off, others left lying unconscious in bloodsoaked remnants of their apparel; bruised and beaten bodies cast off the road to lie for hours unattended and indeed left for dead—all without so much as a 'so sorry'. . . . Not one of such criminal mobsters was arrested or prosecuted.

Violence reached such nation-wide proportions that the Attorney-General of the United States said in a coast-to-coast broadcast:

* *Callette* v. *United States* (Jan. 6, 1943) 132 F. 2d 902.

> . . . *Jehovah's witnesses have been repeatedly set upon and beaten. They had committed no crime; but the mob adjudged they had, and meted out mob punishment. The Attorney General has ordered an immediate investigation of these outrages.*
>
> The people must be alert and watchful, and above all cool and sane. Since mob violence will make the government's task infinitely more difficult, it will not be tolerated. We shall not defeat the Nazi evil by emulating its methods. *

These outrages and the regular convictions of Jehovah's witnesses in the state and lower courts continued unabated for several years. Litigation, prosecutions, proceedings numbered in the thousands. Even the Supreme Court refused for a time to invoke the constitutional guarantees. It seemed as though hysteria and intolerance would sweep away the constitutional rights of the people.

Finally the beacon light of the Federal Bill of Rights caused the judges of the highest tribunal to reconsider the decisions they had made. As stated by Mr. Justice Murphy:

> But there is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches. **

The results flowing from previous decisions of the Supreme Court had clearly demonstrated that the provisions of the Bill of Rights were not being maintained. Those written guarantees constituted the solid rock to which the Court could anchor itself and later reverse even its own judgments. Such a reversal of its own decisions by the Supreme Court was practically unheard of and was only occasioned by the direst necessity of preserving the Constitution. The Bill of Rights was the bulwark on which this wave of frenzied persecution was brought to a shattering halt. In a series of history-making decisions the Supreme Court annulled its previous judgments and gave practical effect to the constitutional liberties guaranteed by the Federal Bill of Rights and saved these precious freedoms which were threatened with extinction.

Almost as if by magic the violence, prosecution and persecution ceased. What had become a national witch hunt was

* Solicitor General Biddle, June 16, 1940.

** *West Virginia State Board of Education* v. *Barnette* 319 U.S. 624.

snuffed out like a candle. When the leaders of the nation, judicial and legislative show respect for minority rights, the people do likewise. When tolerance is not shown to be part of the national outlook, then every petty prejudice is given free reign and unrest is greatly increased.

Let the Canadian people, their legislators and judiciary be warned by this precedent. See that minority rights are protected! The first duty of Parliament is to give heed to the demands of the people and enact a Bill of Rights with teeth in it and give the Supreme Court power to apply it. Such a law will give the Courts clear direction on the path to maintaining freedom, justice, and equality for all.

III

"Eternal Vigilance is the Price of Liberty"

The complete truth of this ancient pearl cannot be more aptly demonstrated than by a consideration of some of the different schemes that have been used in an effort to destroy freedom of speech, press and worship in the United States. Despite the provisions of the Constitution many laws have been passed with a view to limiting the effect of the guaranteed freedoms. In each instance cited, the Federal Bill of Rights proved finally to be the bastion which the forces of reaction could not by-pass.

Some of the efforts were:

(a) Laws requiring permits for distributing literature;
(b) License tax on distribution;
(c) Penalties for non-feasance because of violation of conscience;
(d) Limiting speech by misuse of the law of sedition.

All the foregoing have been used to undermine the right of every citizen freely to state his opinion, whether verbally or by the medium of the press.

(a) Laws Requiring Permits for Distribution of Literature

Such laws generally place in the hands of some public official the power to decide who shall have a permit. This authority is in reality prohibition since the officer may pro-

hibit or not as he sees fit. Whether the opinions are on the subjects of temperance, politics, old age pensions or Chinese missionary societies; he can prohibit if he does not approve. Freedom becomes limited to his own views; it is a ready instrument for oppression. A powerful or majority group could always force the officer to grant a permit. For such the principle of freedom is not required. It is minorities, and particularly unpopular minorities, who alone must invoke it. If freedom of the press does not protect the right of minorities to express their views, then it does nothing. This point was discussed by Chief Justice Latham of the Supreme Court of Australia when dealing with freedom of worship in that Constitution:

> . . . it should not be forgotten that such a provision as section 116 (guaranteeing freedom of worship) is not required for the protection of the religion of a majority. The religion of the majority of the people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities, and, in particular, of unpopular minorities.*

The City of Griffin, Georgia, passed an ordinance making it an offence to distribute literature without a permit from the City Manager. Mrs. Alma Lovell, one of Jehovah's witnesses was convicted of distributing literature without having a permit. It was argued that the by-law invaded her right of freedom of speech and press. The highest state court rejected this contention but the Supreme Court basing itself on the Bill of Rights unanimously declared the by-law invalid and quashed the conviction. The Court stated:

> It covers every sort of circulation 'either by hand or otherwise'. There is thus no restriction in its application with respect to time or place. . . . The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager.
>
> We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. . . . the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. . . .
>
> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The

* *Adelaide Company of Jehovah's Witnesses* v. *The Commonwealth* 67 C.L.R. 116.

> press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. . . .
>
> The ordinance cannot be saved because it relates to distribution and not to publication. *'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.'* * [Italics added]

Special notice is drawn to the concluding clause above. This is the essence of the problem. No objection is ever made to people printing, as long as the publications are destroyed or left unused. Circulation and distribution of the printed information are a component part of the free press. Unless these rights are protected then the citizen and the nation alike are denied the value of free and unlimited discussion and interchange of opinions.

On the same point the Court stated in *Schneider* v. *State* 308 U.S. 147:

> To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees.
>
> Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.

Not only must we maintain the right to distribute but the right to reach people to whom distribution can be made. Whether or not any individual citizen desires to receive the proffered information is something for him to decide.

Through the Bill of Rights, the Supreme Court of the United States protected distribution also by suppressing an ordinance which made it an offence to call at a man's home to speak to him. Faced with this attempted limitation on the right to communicate, the Court stated:

> For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious or other kinds of public meetings. Whether such visiting shall be permitted has in

* *Lovell* v. *Griffin* 303 U.S. 444.

general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. . . .

While door to door distributers of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best of tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance. . . . Many of our most widely established religious organisations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members. The federal government, in its current war bond selling campaign, encourages groups of citizens to distribute advertisements and circulars from house to house. Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to the poorly financed causes of little people.

Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. *

It has been held in Ontario that a by-law prohibiting distribution of circulars was not authorized by the Ontario Municipal Act. Mr. Justice Urquhart also suggested it was *ultra vires* of the province as it would be an infringement on the freedom of the press, a subject belonging to the Dominion government.** In Quebec, however, (notably Hull, Quebec City and other places) there are by-laws prohibiting the distribution of *any* printed matter without the approval of the Chief of Police. Thus in the hands of a municipal officer is placed the power to end even distribution of newspapers.

It is interesting to note that in a very recent case of *Saumur* v. *City of Quebec*** the validity of this by-law was attacked by way of *habeas corpus*. While the majority of the Quebec Court of Appeal held the ordinance to be valid, the Honourable Mr. Justice Galipeault dissented on the basis of the American decision in *Lovell* v. *Griffin, supra*. He said, *inter alia*:

* *Martin* v. *Struthers* 319 U.S. 141.
** *Rex* v. *Mustin* 74 C.C.C. 364.
*** As yet unreported - judgment dated April 18, 1947.

> It is clear that a municipality, town, or city in a Canadian province, where the great majority has the same religious or political faith, would be represented at the City Hall by a Council having the same opinions! With the aid of a by-law such as here considered, could they not prevent the dissemination of ideas, opinions, or beliefs other than those of the majority? The British North America Act protects the free citizens of Canada, and the minorities, from such oppression. *

In view of the dubious power of the municipalities of Quebec to prohibit distribution of printed matter, a recent enactment of the Quebec Legislature has sought to give them this power; though it was admitted it could stop free press activity.** It will thus be seen that local majorities cannot be depended upon to protect the rights of those with whom they do not agree. The Premier of Quebec stated quite openly it was the intention of the statute to stop a minority group from being free to distribute printed Bible sermons. It was admitted that the law could be used to stop distribution of political circulars also.

(b) License Tax on Distribution

"The power to tax is the power to destroy"
Chief Justice Marshall***

Another often-used means of suppressing distasteful minority opinions is the imposition of exorbitant taxation. Small groups trying to exercise their right of free expression often find the expense of printing their opinions a serious outlay. If casual, part-time workers are then forced to pay a large permit fee as peddlers or distributors of circulars before they can begin to disseminate their opinions, the exaction is a prohibition as effective as the discretionary permit.

In 1942 the Supreme Court of the United States upheld the exaction of such a tax on the non-commercial distribution of religious literature by Jehovah's witnesses, by a five to four majority decision. Mr. Chief Justice Stone dissenting said:

* Translation
** (1947) 11 Geo. VI C. 59.
*** *McCulloch* v. *Maryland* 4 Wheat 316.

> In its potency as a prior restraint on publication the flat license tax falls short only of outright censorship or suppression. The more humble and needy the cause, the more effective is the suppression.*

Immediately following the decision of 1942 upholding the license tax, an unprecedented wave of prosecutions began. During the ensuing year before this position was reversed by the Supreme Court in 1943, over twenty-five hundred prosecutions were instituted in every part of the United States. These proceedings resulted almost entirely in convictions. The civil rights of the citizens were in grave danger of being extinguished. If one group could be denied the protection of the law, then the rights of others were no safer!

In 1943, however, due to the staunch battle for civil liberties that was waged, the Supreme Court, guided by the clear judicial beacon of the Bill of Rights, actually reversed its own judgment and the decision of almost every state court in the land. The solid-rock bulwark of the Bill of Rights acted as a dam to hold back the flood designed to overwhelm these vital constitutional rights. Directly after this change, these prosecutions dropped down to practically nothing.

In its judgment of May 3, 1943, which reversed the *Opelika* holding, *supra*, the Supreme Court said:

> Petitioners spread their interpretations of the Bible and their religious beliefs largely through the hand distribution of literature by full or part time workers. They claim to follow the example of Paul, teaching 'publickly, and from house to house.' Acts 20:20. They take literally the mandate of the Scriptures, 'Go ye into all the world, and preach the gospel to every creature.' Mark 16: 15. In doing so they believe that they are obeying a commandment of God.
>
> The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. It has been a potent force in various religious movements . . . whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.

* *Jones* v. *Opelika* (1942) 316 U.S. 584.

> We only hold that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as a high a claim to constitutional protection as the more orthodox types. . . .
>
> But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. . . . It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist, however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way. As we have said, the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult. On this record it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture. It is a distortion of the facts of record to describe their activities as the occupation of selling books and pamphlets. *

A timely warning was sounded by Mr. Justice Frank Murphy in *Follet* v. *McCormick* 321 U.S. 573:

> It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds.

It is not only by discriminatory laws but also by misapplication of taxation statutes that a citizen can be denied freedom of speech and press. All these foregoing instances demonstrate the length to which the local majorities will go to abrogate minority rights. In each case, the state courts had denied any protection. Only the Federal Bill of Rights can lift such questions past narrow local prejudices into the Supreme Court which in any nation is the proper repository of such decisions. The Bill of Rights has been the means of preventing much injustice.

The very problem that is the basis of the Murdock decision is moot in Canada at this moment. In the City of Montreal there are at this time more than seven hundred charges pending wherein citizens have sought to distribute literature with-

* *Murdock* v. *Pennsylvania* 319 U.S. 103.

out obtaining a hundred dollar permit. Civic officials, with the object of preventing expression of views with which they do not agree, pretend that Jehovah's witnesses are engaged in the business of peddling and distributing circulars. It is not material that the person is a child or part-time worker who only engages a small part of his time. It is not material that most of the publications are donated and the activity is carried on at a loss. A citizen has free speech in Montreal if he has one hundred dollars to buy it, not otherwise. Even then the City reserves the right to refuse the permit. Freedom of speech and press do not exist under these circumstances. A Federal Bill of Rights would abolish such a prejudiced and discriminatory violation of civil liberty.

(c) Penalty for Non-feasance Because of Violation of Conscience

The right of free conscience should also be protected as suggested in Lord Sankey's draft Bill of Rights. (See *Appendix*) If men are to be excused on the ground of conscience from matters as essential as military service; then there is no reason that the same basis should not be a ground for excusing other requirements not nearly so important. Failure to make such an allowance simply puts in the hands of the bigoted the power to make technical (and probably valueless) requirements which will offend someone's conscience and thereby give an excuse for petty persecution. This was one of Hitler's schemes against Jehovah's witnesses, who were one of the first organizations to be banned in Germany. Anyone who would not pay lip service to the State by joining in the voting of one of his fraudulent elections, he would send the Gestapo around to put them in a concentration camp.

Hitler tried to mould the German people into a nation of non-thinking conformists. Especially did he seek to control the youth. All were required to join state-approved political and psuedo-health organizations, to heil the Fuehrer, etc. Jehovah's witnesses did not do this and were cruelly persecuted and put to death as a result. It can happen here. A guaranteed right of conscience could prevent it to the betterment both of the nation and its individual citizens.

The Supreme Court of the United States had the question of the right of non-joinder in requested activity before it in the case of *West Virginia State Board of Education* v. *Barnette* 319 U.S. 624. This was an effort by school authorities to expel children of Jehovah's witnesses who refused to salute the flag because of objection on conscientious grounds to this exercise. This fearless and open-minded application of the Bill of Rights to prevent discrimination against sincere Christian people because of their beliefs is a landmark of fair play. Without such protection minorities will always be open to discriminatory attacks because of objection to generally accepted standards of practice.

The court said:

> To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind. . . .
>
> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . .
>
> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations to the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. . . .
>
> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

If people do not engage in generally accepted activities and ceremonies out of a true belief in them, their simulation of joinder under force is worse than nothing. It is a fraud and hypocrisy. Officials who try to enforce such a thing are false to the very principles they are supposed to uphold. They encourage nothing but dishonesty:

> . . . all attempts to influence (the mind) by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, . . .*

The menace to intellectual freedom foreseen by Jefferson has been effectually overborne by the Federal Constitution which thereby halted the efforts of bigots to make non-conformity a crime. If we are to have a nation free to think, then we can expect that some will reach different conclusions. As stated by the Court in the *Barnette* case, *supra*:

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes.

A constitutional guarantee will prevent Canada from ever becoming a nation of robots who cannot think originally and differently and thereby keep the nation abreast of the swiftly changing times.

(d) Abolishing Free Speech by Misuse of Sedition Laws

The offence of sedition as it presently operates in this country is medieval. During the past twenty-five years such prosecutions have been confined almost exclusively to Quebec. The principles being laid down, however, would serve as a ready instrument for oppression elsewhere. The basic test that has been used is not the dangerous action of the accused in the sense that he has advocated use of force or taken any step that would constitute from his own action or that of others a 'real and present danger to the state'; but rather the opinion of the judge as to what the tendency of the ideas may or may not be in the far distant future. Evil intent is inferred from the judge's or jury's opinion of what the *tendency* of the writings or statements may be.

This argument of evil tendency, arraying class against

* Virginia Statute for Religious Freedom.

class, and disrespect for all government and order was succinctly summed up by Judge Amidon in charging a jury:

> The head and front of it is that the speech tended to array class against class. I have been on this earth quite a spell myself. I have never known of any great reform being carried through where the people whose established condition would be disturbed by the carrying out of the reform did not say that the people who were trying to bring about the reform were stirring up class against class. This is an argument that I know to be at least 3,500 years old from my knowledge of history, and it is repeated in every effort to change an existing condition. *

Jefferson's preamble to the Virginia Act for the establishment of Religious Freedom is exactly in point:

> . . . to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he, being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square or differ from his own. **

A Liberal thinks that the ultimate result of Conservative ideas will be anarchy; the Conservative thinks the same of the C.C.F. Criticism of the rotten boroughs, and of army floggings have from time to time been found to be seditious in England.***

In the case of *Rex* v. *Duval* 64 Q.K.B. 270 and *Rex* v. *Barrett and Brodie* 1936 S.C.R. 188 (Quebec appeal decision unreported) the judges of the Quebec Court of Appeal accepted as evidence statements of Catholic priests called as witnesses to the effect that in their opinion the writings were dangerous. Not the slightest attempt was made to show that any outbreak against the government was advocated. It was admitted that some statements expressly advised against violence. By rejecting the evidence before the court and acting on what was not there, the judgment succeeded in concluding that the writings were seditious. The judges said in substance that they disagreed, and that the opinions did not "square with their own."

* *United States* v. *Brinton* Bull. 132.

** Hening: *Statutes at Large* - Virginia Vol. XII, p. 84.

*** *Rex* v. *Drakard* 21 How. St. Tr. 495, 535; *Rex* v. *Muir*. May Const. History II 38-41.

These Quebec decisions really mean that if you undertake to expound views distasteful to the judges, they are apt to be found to be seditious, even though no violence or lawless alteration of the existing conditions is advocated. Proponents of unpopular theories will always be found to have a bad intention. To properly protect the right of free discussion consideration might well have been given to a statement of Lord Justice Scrutton:

> It is indeed one test of belief in principles if you apply them to cases with which you have no sympathy at all. You really believe in freedom of speech if you are willing to allow it to men whose opinions seem to you wrong and even dangerous. *

A much more reasonable approach to this problem has been made by Mr. Justice Holmes of the Supreme Court of the United States in the case of *Schenck* v. *United States* 249 U.S. 47:

> The question in every case is whether words used in such circumstances are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. [Italics added.]

In harmony with the objective test employed in the United States and also in a leading judgment of the South African Court of Appeal, the activities and beliefs of Jehovah's witnesses have been held to be not seditious.

When faced with this question the American Supreme Court said:

> The last mentioned appellants were also charged with oral teachings and the dissemination of literature calculated to encourage disloyalty to the state and national governments. . . .
>
> The statute as construed in these cases makes it a criminal offense to communicate to others views and opinions respecting governmental policies, and prophecies concerning the future of our own and other nations. As applied to the appellants it punishes them although what they communicated is not claimed or shown to have been done with an evil or sinister purpose, to have advocated or incited subversive action against the nation or state, or to have threatened any clear and present danger to our institutions or our government. What these appellants communicated were their beliefs and opinions concerning domestic measures and trends in national and world affairs.

* *Rex* v. *Home Secretary* (1923) 2 K.B. 361.

class, and disrespect for all government and order was succinctly summed up by Judge Amidon in charging a jury:

> The head and front of it is that the speech tended to array class against class. I have been on this earth quite a spell myself. I have never known of any great reform being carried through where the people whose established condition would be disturbed by the carrying out of the reform did not say that the people who were trying to bring about the reform were stirring up class against class. This is an argument that I know to be at least 3,500 years old from my knowledge of history, and it is repeated in every effort to change an existing condition. *

Jefferson's preamble to the Virginia Act for the establishment of Religious Freedom is exactly in point:

> . . . to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he, being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square or differ from his own. **

A Liberal thinks that the ultimate result of Conservative ideas will be anarchy; the Conservative thinks the same of the C.C.F. Criticism of the rotten boroughs, and of army floggings have from time to time been found to be seditious in England.***

In the case of *Rex* v. *Duval* 64 Q.K.B. 270 and *Rex* v. *Barrett and Brodie* 1936 S.C.R. 188 (Quebec appeal decision unreported) the judges of the Quebec Court of Appeal accepted as evidence statements of Catholic priests called as witnesses to the effect that in their opinion the writings were dangerous. Not the slightest attempt was made to show that any outbreak against the government was advocated. It was admitted that some statements expressly advised against violence. By rejecting the evidence before the court and acting on what was not there, the judgment succeeded in concluding that the writings were seditious. The judges said in substance that they disagreed, and that the opinions did not "square with their own."

* *United States* v. *Brinton* Bull. 132.

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> Under our decisions criminal sanctions cannot be imposed for such communication. *

The "clear and present danger" test is much more reasonable and practical than the "tendency" principle that has been used in Canada. Ideas that may be considered to have a dangerous tendency today, may be the law of the land ten years from now. Judges and juries may be able to tell about firing the gun that killed John Smith but such ability does not necessarily make them capable of long-range forecasts on the tendency of certain political or other philosophies as related to world development. They will almost invariably condemn what they do not agree with. While the law remains in its present state it is a constant threat to a man's right to propound novel ideas, which may change the existing thought on certain lines. Many advanced thinkers may not desire to make martyrs of themselves. Valuable expression is therefore stifled. It is not only with laws that are invalid on their face that injustice can arise:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. **

IV

Conclusion

Freedom of speech, press and worship are important, not as words reserved for speeches in the hustings but as proper to be applied in the workaday world in which we live. Above instances simply demonstrate the number of means whereby these precious rights may be abolished if not protected by legal guarantees with teeth in them.

The fight of Jehovah's witnesses in the United States is widely acknowledged as having been the means of establishing with firmness the individual personal liberties, not only

* *Taylor v. State* 319 U.S. 583.

** *Concordia Fire Insurance Co. v. Illinois* (1934) 292 U.S. 535.

of themselves, but of all other citizens. Writing in the *Minnesota Law Review*, Judge Waite said:

> It is plain that present constitutional guaranties of personal liberty, as authoritatively interpreted by the United States Supreme Court, are far broader than they were before the spring of 1938; and that most of this enlargment is to be found in the thirty-one Jehovah's Witnesses cases (sixteen deciding opinions) of which *Lovell* v. *City of Griffin* was the first. If 'the blood of the martyrs is the seed of the Church,' what is the debt of Constitutional Law to the militant persistency—or perhaps I should say devotion—of this strange group? *

Neither the courts nor individuals devoted to the preservation of civil liberties can fight without weapons. In the United States the Federal Bill of Rights has been a proved beacon light for the courts and a strong buttress for the civil liberties of the people. Issue is now joined on this matter. Hundreds of thousands of liberty-loving Canadian people have expressed their opinions through the press and by means of petition to the government. The responsibility now rests with Parliament to give a clear guarantee of the rights of freedom of speech, freedom of the press, and freedom of worship. Let these vital liberties be incorporated in a written Bill of Rights and give the Supreme Court power to enforce it!

* "Debt of Constitutional Law to Jehovah's Witnesses"
(1944) 28 M.L.R. 209, 246.

APPENDIX

Declaration of Rights

Lord Sankey's Drafting Committee

INTRODUCTION

Within the space of little more than a hundred years there has been a complete revolution in the material conditions of human life.

Invention and discovery have so changed the pace and nature of communications round and about the earth that the distances which formerly kept the states and nations of mankind apart have now been practically abolished.

At the same time there has been so gigantic an increase of mechanical power, and such a release of human energy, that men's ability either to co-operate with, or to injure and oppress one another, and to consume, develop or waste the bounty of Nature, has been exaggerated beyond all comparison with former times.

This process of change has mounted swiftly and steadily in the past third of a century, and is now approaching a climax.

It becomes imperative to adjust man's life and institutions to the increasing dangers and opportunities of these new circumstances. He is being forced to organise co-operation among the medley of separate sovereign States which has hitherto served his political ends.

At the same time he finds it necessary to rescue his economic life from devastation by the immensely enhanced growth of profit-seeking business and finance.

Political, economic and social collectivisation is being forced upon him.

He responds to these new conditions blindly and with a great wastage of happiness and well-being.

Governments are either becoming State collectivisms or passing under the sway of monopolist productive and financial organisations.

Religious organisations, education and the Press are subordinated to the will of dictatorial groups and individuals, while scientific and literary work and a multitude of social activities, which have hitherto been independent and spontaneous, fall under the influence of these modern concentrations of power.

Neither Governments nor great economic and financial combinations were devised to exercise such powers; they grew up in response to the requirements of an earlier age.

Under the stress of the new conditions, insecurity, abuses and tyrannies increase; and liberty, particularly liberty of thought and speech, decays. Phase by phase these ill-adapted Governments and controls are restricting that free play of the individual mind which is the preservative of human efficiency and happiness.

The temporary advantage of swift and secret action which these monopolisations of power display is gained at the price of profound and progressive social demoralisation.

Bereft of liberty and sense of responsibility, the peoples are manifestly doomed to lapse, after a phase of servile discipline, into disorder and violence. Confidence and deliberation give place to hysteria, apathy and inefficiency.

Everywhere war and monstrous economic exploitation are intensified, so that those very same increments of power and opportunity which have brought mankind within sight of an age of limitless plenty seem likely to be lost again, and, it may be, lost for ever, in a chaotic and irremediable social collapse.

It becomes clear that a unified political, economic and social order can alone put an end to these national and private appropriations that now waste the mighty possibilities of our time.

The history of the Western peoples has a lesson for all mankind.

It has been the practice of what are called the democratic or Parliamentary countries to meet every enhancement and centralisation of power in the past by a definite and vigorous reassertion of the individual rights of man.

Never before has the demand to revive that precedent been so urgent as it is now.

We of the Parliamentary democracies recognise the inevitability of world reconstruction upon collectivist lines, but, after our tradition, we couple with that recognition a Declaration of Rights, so that the profound changes now in progress shall produce not an attempted reconstruction of human affairs in the dark, but a rational reconstruction conceived, and arrived at, in the full light of day.

To that time-honoured instrument of a Declaration of Rights we therefore return, but now upon a world scale.

1.—RIGHT TO LIVE

By the word "man" in this Declaration is meant every living human being without distinction of age or sex.

Every man is a joint inheritor of all the natural resources and of the powers, inventions and possibilities accumulated by our forerunners.

He is entitled, within the measure of these resources and without distinction of race, colour or professed beliefs or opinions, to the nourishment, covering and medical care needed to realise his full possibilities of physical and mental development from birth to death.

Notwithstanding the various and unequal qualities of individuals, all men shall be deemed absolutely equal in the eyes of the law, *equally important in social life* and equally entitled to the respect of their fellow-men.

2.—PROTECTION OF MINORS

The natural and rightful guardians of those who are not of an age to protect themselves are their parents.

In default of such parental protection in whole or in part, the community, having due regard to the family traditions of the child, shall accept or provide alternative guardians.

3.—DUTY TO THE COMMUNITY

It is the duty of every man not only to respect but to uphold and to advance the rights of all other men throughout the world.

Furthermore, it is his duty to contribute such service to the community as will ensure the performance of those neces-

sary tasks for which the incentives which will operate in a free society do not provide.

It is only by doing his quota of service that a man can justify his partnership in the community.

No man shall be conscripted for military or other service to which he has a conscientious objection, but to perform no social duty whatsoever is to remain unenfranchised and under guardianship.

4.—RIGHT TO KNOWLEDGE

It is the duty of the community to equip every man with sufficient education to enable him to be as useful and interested a citizen as his capacity allows.

Furthermore, it is the duty of the community to render all knowledge available to him and such special education as will give him equality of opportunity for the development of his distinctive gifts in the service of mankind. He shall have easy and prompt access to all information necessary for him to form a judgment upon current events and issues.

5.—FREEDOM OF THOUGHT AND WORSHIP

Every man has a right to the utmost freedom of expression, discussion, association and worship.

6.—RIGHT TO WORK

Subject to the needs of the community, a man may engage in any lawful occupation, earning such pay as the contribution that his work makes to the welfare of the community may justify.*

* It has been objected with manifest justice that this Article 6 implies that the only employers shall be the State, and that it hands over a man's energies to the direction and sanctions of some sort of public authority, some labour commissar or what not. Here the intricate difficulties of committee work defeated the plain intentions of the drafters. Manifestly something was cut out from this Article, and a gap was left and never filled up again. Plainly our Drafting Committee failed to assert one of the most vital of human rights, the right of every man to make and do things for himself or for anyone else and for any consideration or none, provided the general welfare is not infringed and there is no speculative appropriation of his work. It was that speculative appropriation the committee was worrying about. This gap, unless it is amended, would for example kill all unlicensed art whatever, all free literature, all unsanctioned research, all experiment that officialdom failed to approve. But I believe, subject to the criticism of those more experienced upon these

He is entitled to paid employment and to make suggestions as to the kind of employment which he considers himself able to perform.

Work for the sole object of profit-making shall not be a lawful occupation.

7.—RIGHT IN PERSONAL PROPERTY

In the enjoyment of his personal property, lawfully possessed, a man is entitled to protection from public or private violence, deprivation, compulsion and intimidation.

8.—FREEDOM OF MOVEMENT

A man may move freely about the world at his own expense.

His private dwelling, however, and any reasonably limited enclosure of which he is the occupant, may be entered only with his consent or by a legally qualified person empowered with a warrant as the law may direct.

So long as by his movement he does not intrude upon the private domain of any other citizen, harm, or disfigure or encumber what is not his, interfere with, or endanger its proper use, or seriously impair the happiness of others, he shall have the right to come and go wherever he chooses, by land, air, or water, over any kind of country, mountain, moorland, river, lake, sea or ocean, and all the ample spaces of this, his world.

9.—PERSONAL LIBERTY

Unless a man is declared by a competent authority to be a danger to himself or to others through mental abnormality,

issues, that a few liberating words will restore the lost intention of the clause. Suppose that after the word "justify," we add:

"Or that the desire of any private individual or individuals for his products, his performances or the continuation of his activities may produce for him."

And I would further insert "freely" after "engage" in the opening sentence of the Article.

Until it has been accepted by Parties and Governments, the Declaration remains a provisional and unofficial document capable of amendment. I think this gap is the only serious flaw that has been discovered in it, and I believe this gap was made possible by, among other things, the feeling that Article 11 would be sufficient to protect the individual from dogmatic control.

a declaration which must be confirmed within seven days and thereafter reviewed at least annually, he shall not be restrained for more than twenty-four hours without being charged with a definite offence, nor shall he be remanded for a longer period than eight days without his consent, nor imprisoned for more than three months without a trial.

At a reasonable time before his trial, he shall be furnished with a copy of the evidence which it is proposed to use against him.

At the end of the three months period, if he has not been tried and sentenced by due process of the law, he shall be acquitted and released.

No man shall be charged more than once for the same offence.

Although he is open to the free criticism of his fellows, a man shall have adequate protection from any misrepresentation that may distress or injure him.

Secret evidence is not permissible. Statements recorded in administrative dossiers shall not be used to justify the slightest infringement of personal liberty.

A dossier is merely a memorandum for administrative use; it shall not be used as evidence without proper confirmation in open court.

10.—FREEDOM FROM VIOLENCE

No man shall be subjected to any sort of mutilation except with his own deliberate consent, freely given, nor to forcible handling, except in restraint of his own violence, nor to torture, beating or any other physical ill-treatment.

He shall not be subjected to mental distress, or to imprisonment in infected, verminous or otherwise insanitary quarters, or to be put into the company of verminous or infectious people.

But if he is himself infectious or a danger to the health of others, he may be cleansed, disinfected, put in quarantine or otherwise restrained so far as may be necessary to prevent harm to his fellows.

No one shall be punished vicariously by the selection, arrest or ill-treatment of hostages.

11.—RIGHT OF LAW-MAKING

The rights embodied in this Declaration are fundamental and inalienable.

In conventional and in administrative matters, but in no others, it is an obvious practical necessity for men to limit the free play of certain of these fundamental rights.

(In, for example, such conventional matters as the rule of the road or the protection of money from forgery, and in such administrative matters as town and country planning, or public hygiene.)

No law, conventional or administrative, shall be binding on any man or any section of the community unless it has been made openly with the active or tacit acquiescence of every adult citizen concerned, given either by direct majority vote of the community affected or by a majority vote of his representatives publicly elected.

These representatives shall be ultimately responsible for all by-laws and for detailed interpretations made in the execution of the law.

In matters of convention and collective action, man must abide by the majority decisions ascertained by electoral methods which give effective expression to individual choice. All legislation must be subject to public discussion, revision or repeal. No treaties or contracts shall be made secretly in the name of the community.

The fount of legislation in a free world is the whole people, and since life flows on constantly to new citizens, no generation can, in whole or in part, surrender or delegate this legislative power, inalienably inherent in mankind.

[Reprinted from H. G. Wells, *The Common Sense of War and Peace.*]